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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

NATIONAL URBAN LEAGUE, et al.,

Plaintiffs,

v.

WILBUR L. ROSS, JR., et al.,

Defendants.

CASE NO. 5:20-cv-05799-LHK

**JOINT CASE MANAGEMENT
STATEMENT**

Date: December 11, 2020

Time: 1:30 p.m.

Place: Courtroom 8

Judge: Hon. Lucy H. Koh

Pursuant to Civil Local Rule 16-10(d) and the Court’s Order on November 13, 2020 (Dkt. 357), the parties to this action, by their respective counsel, respectfully submit the following Joint Case Management Statement in anticipation of the Further Case Management Conference scheduled for December 11, 2020 at 1:30 p.m.

I. FACT DISCOVERY

On November 13, 2020, the Court entered a Case Management Order, setting forth an expedited pre-trial schedule—including a fact discovery cutoff of January 7, 2020—and limiting the parties to 10 interrogatories, 25 Requests for Admission (“RFAs”), 2 sets of Requests for Production (“RFPs”) with no more than 25 RFPs total, and 5 fact depositions, including 2 Rule 30(b)(6) depositions. Dkt. 357. The order further requires the parties to serve responses and objections to RFPs within 10 days of receipt and to “start producing documents, for which no objections are asserted, within 14 days.” *Id.* By contrast, the order affords the parties 30 days to respond to Interrogatories and Requests for Admission, meaning that the last day to timely serve such discovery was December 8, 2020. *Id.* at 2.

A. Initial Disclosures

In accordance with the Court’s Case Management Order, the parties exchanged initial disclosures on November 18, 2020.

B. Written Discovery and Document Productions

On November 17, 2020, Plaintiffs served their First Set of RFPs on Defendants. On November 27, 2020, Defendants served their Responses and Objections to Plaintiffs’ RFPs. On December 1, 2020, Defendants produced 175 documents to Plaintiffs. On December 9, 2020, Defendants produced an additional 516 documents. Defendants have not produced identifying information with these productions (e.g., custodians, dates, metadata, etc.) as was provided with previous productions.

On December 1, 2020, Defendants served their First Set of Interrogatories on Plaintiffs. Plaintiffs’ responses are due December 31, 2020.

On December 7, 2020, Defendants served their First Set of RFAs on Plaintiffs. Plaintiffs’ responses are due January 6, 2020.

On December 8, 2020, Defendants served their Second Set of RFAs on Plaintiffs. Plaintiffs' responses are due January 7, 2020.

Plaintiffs have not served any interrogatories or requests for admission to date.

Plaintiffs' position: As set forth below, because Defendants have only produced a limited set of documents (a large portion of which are duplicates), Plaintiffs have been unable to craft appropriately tailored Interrogatories and RFAs. Plaintiffs' motion to compel requests that the Court compel an additional Rule 30(b)(6) deposition, to take place no later than December 17, 2020, so that Plaintiffs may better understand how best to craft and tailor their Interrogatories and RFAs to obtain critical discovery. Following this early Rule 30(b)(6) deposition, Plaintiffs will serve narrow and tailored Interrogatories and RFAs on Defendants no later than December 23, 2020. Plaintiffs propose that Defendants will have 14 days to respond to such Interrogatories and RFAs.

Defendants' position: Plaintiffs have now, by their own admission, purposefully decided *not* to serve Interrogatories or Requests for Admission within the timeline allowed by the Court and agreed to by Plaintiffs, and now demand that the Court rewrite its already-accelerated schedule and compress Defendants' timeline for filing an Answer. Plaintiffs thus propose a new schedule two levels removed from that originally ordered by the Court; a deposition next Thursday, and then the actual RFAs and Interrogatories propounded the day before Christmas Eve. Plaintiffs efforts to obstruct the existing schedule—to which they agreed—in order to gain leverage in their promised motion to compel is inappropriate, and should not be rewarded with relief. In the parties' discussions, Defendants repeatedly indicated specific areas that Plaintiffs could explore with written discovery. Plaintiffs' failure to timely avail themselves of that opportunity is not a basis to enter an order against Defendants.

C. Depositions

The parties have not yet noticed any fact witness or Rule 30(b)(6) depositions. Plaintiffs anticipate serving deposition notices for three facts witnesses, two Rule 30(b)(6) witnesses, and the additional Rule 30(b)(6) witness requested in Plaintiffs' motion to compel.

II. MOTIONS

1 The Court has already ruled on numerous motions in this action. Accordingly, the parties
2 focus this section on pending motions.

3 **A. Ninth Circuit Appeal**

4 Currently, the Court's preliminary injunction order (Dkt. 208, clarified in Dkt. 288) is on
5 appeal at the Ninth Circuit. On December 7, 2020, Plaintiffs filed a Motion to Hold the Appeal
6 in Abeyance or, in the Alternative, for a 30-Day Extension of Time to File Response Brief.
7 Plaintiffs argued that the Ninth Circuit should hold the appeal in abeyance until April 30, 2021.
8 Alternatively, Plaintiffs argued that the Ninth Circuit should hold the appeal in abeyance until
9 December 31, 2020, or until the Secretary of Commerce delivers 2020 Census population
10 numbers to the president, whichever is later. Counsel for Defendants indicated that they oppose
11 Plaintiffs' motion, but do not intend to file a written opposition unless requested.

12 **B. Defendants' Motion to Dismiss and Motion to Stay**

13 Defendants responded to Plaintiffs' Second Amended Complaint on November 10, 2020
14 by filing a motion to dismiss, set for a December 17, 2020 hearing date. Dkt. 354. The same
15 day, Defendants also filed a motion to stay these proceedings until the Bureau completes the
16 2020 Census and the President reports the apportionment results, or until Defendants' appeal of
17 the Court's preliminary injunction is fully resolved, whichever is later. Dkt. 355. Defendants'
18 stay motion is also currently set for hearing on December 17, 2020. Plaintiffs filed their
19 oppositions to Defendants' motion to dismiss and motion to stay on November 24, 2020. Dkt.
20 364, 365. Defendants did not file any replies. The parties believe that Defendants' motion to
21 dismiss and motion to stay can be resolved on the papers without need for a December 17, 2020
22 hearing. Accordingly, the parties request that the motions be taken under submission and the
23 December 17, 2020 hearing date be taken off calendar. Plaintiffs further request that the Court
24 order Defendants to respond to the Second Amended Complaint within 7 days of the Court's
25 ruling on Defendants' motion to dismiss; Defendants request that in the event the Court denies
26 Defendants' motion to dismiss, they be given until after the close of fact discovery to file an
27 Answer or, in the alternative and at minimum, the 14 days to file an Answer provided by Fed. R.
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Civ. P. 12(a)(4)(A). Plaintiffs have been more than capable of serving broad discovery—and have now requested more—all without an Answer from Defendants.

C. Plaintiffs’ Motion to Compel and Motion to Shorten Time and Expedite

Plaintiffs are filing today a Motion to Compel Production of Documents and a Motion to Shorten Time and Expedite. Plaintiffs request expedited resolution of their Motion to Compel, such that Defendants’ opposition is due December 10, 2020 at 5:00 p.m. and the Court schedule an emergency hearing on Plaintiffs’ Motion to Compel to occur simultaneous with the December 11, 2020 CMC, or as soon as practicable.

Summary of Plaintiffs’ position: Defendants have understood for weeks that the Court ordered expedited discovery, but they have repeatedly failed to meet their discovery obligations. After rebuffing multiple early attempts by Plaintiffs to meet and confer so that the parties could work together expeditiously, Defendants’ productions have been minimal, largely duplicative, and without custodian, date, and other identifying information. Three categories of documents are notably missing from Defendants’ productions. First, any documents collected and prepared in response to requests from the House Committee on Oversight and Reform that are—according to Defendant Dillingham and “other top Census Bureau officials”—in the possession of the General Counsel of the Department of Commerce. Second, any Census Integration Group (“CIG”) documents, which Defendants have represented are responsive. And third, documents that show the details of the Bureau’s current data-processing plans, procedures, and schedule (including changes). Defendants have failed to adequately explain why these categories of documents have not been immediately produced and failed to provide sufficient information as to how Defendants retain, manage, and organize data and how they are collecting and producing documents in this litigation. To allow Plaintiffs an adequate and fair opportunity to obtain critical discovery in this case, Plaintiffs seek an order compelling an additional, narrow Rule 30(b)(6) deposition, to take place no later than December 17, 2020, on the topics of Defendants’ retention, organization, collection, review, and production of documents and data, as well as the search functionalities and capabilities of Defendants’ various databases. Following this early limited Rule 30(b)(6) deposition, Plaintiffs will serve narrow and tailored Interrogatories and

1 RFAs on Defendants no later than December 23, 2020. Plaintiffs propose that Defendants will
 2 have 14 days to respond to such Interrogatories and RFAs.

3 Summary of Defendants' position: Despite their assurances to the Court and
 4 Defendants at the last Court conference that a highly expedited discovery period was appropriate
 5 because they would seek only narrow and targeted discovery, Plaintiffs served a set of very
 6 broad and burdensome document requests on Defendants. For example, Plaintiffs have
 7 requested "All Documents comparing, contrasting, or assessing the 2020 Census data collection
 8 results with the 2000 and 2010 census data collection results." By its own terms, the request
 9 potentially implicates (i) materials that were produced over two decades ago, regardless of their
 10 relevancy to Plaintiffs' claims, as well as (ii) information that is currently not available, and
 11 which may not be available until a later date, if ever, and (iii) material that may be statutorily
 12 protected from disclosure. Many of the issues Plaintiffs seek to explore could have been
 13 established much more efficiently through targeted discovery such as interrogatories, yet
 14 Plaintiffs have insisted that Defendants undertake the burden of gathering, reviewing, and
 15 producing a vast quantity of documents from numerous custodians on numerous distinct topics.
 16 In addition, over the course of the past week, Plaintiffs have made a series of shifting requests
 17 for categories of documents they want prioritized, demanding that such documents be provided
 18 by arbitrary deadlines that Plaintiffs unilaterally set.

19 Defendants have worked diligently in the face of Plaintiffs' requests and demands to
 20 discharge their discovery obligations in a comprehensive and systematic manner. Upon
 21 receiving Plaintiffs' original requests for production, Defendants took the necessary time to
 22 identify custodians most likely to have responsive materials, upload their emails to a document
 23 review platform, establish search terms most likely to eliminate the mass of non-responsive
 24 matter, and begin focused and targeted review. Further, Defendants identified several types of
 25 non-email documents that were most likely to satisfy Plaintiffs' various requests for raw data and
 26 statistics about the census, and, in an effort to accommodate Plaintiffs' stated priorities, have
 27 expedited the process of reviewing and producing those materials.
 28

1 Defendants described these efforts in detail to Plaintiffs in their formal responses to
2 Plaintiffs' requests, in two subsequent meet-and-confer conferences, and in numerous email
3 communications. These good-faith efforts on the part of Defendants have been repeatedly met
4 with accusations on the part of Plaintiffs that Defendants did not seek to meet and confer
5 *immediately* upon receiving Plaintiffs' broad requests but instead took time to take stock of how
6 much material could be implicated by Plaintiffs' requests and how Defendants could reasonably
7 go about searching for the relevant information. These complaints are fatuous. To the extent
8 Plaintiffs wished to narrow their requests beyond what they indicated in their written discovery,
9 nothing ever stopped them from doing so through written communication to Defendants, without
10 awaiting a meet and confer. Or Plaintiffs could have propounded more limited discovery in the
11 first place. But as the parties' discussions have progressed, there has been no effort to narrow or
12 otherwise relieve any of the burdens Plaintiffs have foisted onto Defendants. Rather, those
13 discussions have merely led Plaintiffs to present a shifting set of priorities for the documents that
14 Plaintiffs wish to see first, and wide-ranging accusations that Defendants are shirking their
15 obligations.

16 Against this backdrop, Plaintiffs' threatened motion to compel and demand for an
17 accelerated timeline for resolving that motion is inappropriate. Plaintiffs first threatened to file
18 such a motion since December 4, 2020, and indicated that they would begin to draft their motion
19 even as Defendants worked to provide additional clarity about the contents of upcoming
20 productions and the efforts that have been made to accelerate the documents at issue. Yet now
21 Plaintiffs demand that Defendants be given at most 24 hours to respond to a motion that has been
22 nearly a week in the making. Such a timeline is unfair. If Plaintiffs file their motion today,
23 Defendants should be permitted to respond to the motion on December 14, 2020, and the Court
24 should reschedule this CMC for that date and combine it with a hearing on Plaintiffs' threatened
25 motion. As one Court has observed, "[t]he filing of an emergency motion is rife with the
26 possibility of bad faith gamesmanship" where, as here, the "movant is attempting to game the
27 system by providing itself proper time to present its positions to the Court but depriving the
28 opposing party of a reasonable opportunity to respond, effectively becoming an *ex parte* motion

by which the opposing party has ‘notice’ of its filing but no real chance to adequately respond.”
Cardoza v. Bloomin’ Brands, Inc., 141 F. Supp. 3d 1137, 1141 (D. Nev. 2015).

Perhaps more importantly, the work of accommodating and responding to Plaintiffs’ discovery requests continues to divert resources of Census Bureau personnel from their primary obligation of completing the 2020 Census. Despite all this, Defendants are continuing to work in good faith to discharge their discovery obligations, and to accelerate as much as is possible the review and production of both targeted documents that Plaintiffs have demanded and the broader set of materials responsive to Plaintiffs’ requests. Thus far, Defendants have made two productions of materials, and, in direct response to one of Plaintiffs’ many demands, anticipate making the next release this Friday, December 11, 2020.

Separately, as noted above, Defendants have timely served upon Plaintiffs a set of targeted written discovery requests that pose narrow questions concerning the scope of Plaintiffs’ injuries, the relief they seek in this lawsuit, and related issues. Defendants hope that Plaintiffs respond to these requests fully and transparently, such that Defendants can receive clarity regarding the precise base for Plaintiffs’ claim to Article III standing in this lawsuit, how they intend to establish those their asserted injuries, the scope of relief they will ultimately request from this Court, and how they intend to establish that any such relief will redress their asserted injuries. To the extent the Court accelerates the timeline for Defendants to respond to any written discovery, the Court should similarly accelerate the timeline for Plaintiffs’ responses to Defendants’ requests.

III. AMENDMENT OF PLEADINGS

Plaintiffs’ Position: Defendants have not filed an Answer to the Second Amended Complaint. Nevertheless, many of Defendants’ discovery requests implicate allegations in Plaintiffs’ Second Amended Complaint. In order to facilitate the expedited discovery schedule in this case, Plaintiffs request that Defendants be required to file their Answer to the Second Amended Complaint within 7 days of the Court’s order resolving Defendants’ motion to dismiss.

Defendants’ Position: Defendants’ discovery seeks information *in Plaintiffs’ custody or control* concerning the allegations Plaintiffs make in their complaint. Responses to such requests

1 will not be informed by Defendants' submitting an Answer, because the Answer cannot speak to
2 information that Plaintiffs do or do not know. Accordingly, Defendants maintain that no
3 shortening of the Answer deadline is necessary or appropriate. Quite the opposite, to the extent
4 Plaintiffs wish to streamline the discovery process in this matter, the Answer deadline should be
5 deferred until after the close of fact discovery.

6 **IV. ALTERNATIVE DISPUTE RESOLUTION**

7 Plaintiffs maintain that the case will not be resolved through an ADR process.
8 Defendants believe that a brief pause in proceedings to explore ADR may be productive both to
9 resolve the parties' emerging discovery disputes and to understand the relief Plaintiffs are
10 seeking in this action.

Dated: December 9, 2020

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20 **ATTESTATION**

21 I, Sadik Huseny, am the ECF user whose user ID and password authorized the filing of this
22 document. Under Civil L.R. 5-1(i)(3), I attest that all signatories to this document have concurred
23 in this filing.

24
25 Dated: December 9, 2020

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